BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 13-05

OCEAN TRANSPORTATION INTERMEDIARY LICENSING AND FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA" or "Association") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in this docket October 10, 2014 (79 Fed. Reg. 61544).

As the Commission is aware, the NCBFAA is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers ("NVOCCs") and customs brokers in the ocean shipping industry. The NCBFAA's 1,000 regular members and 28 affiliated regional associations previously submitted Comments to the Advance Notice of Proposed Rulemaking ("ANPRM") in this docket and are directly affected by the proposed changes to the existing regulations that are set forth in the NPRM.

The NCBFAA appreciates the opportunity to provide its comments in response to the NPRM, and particularly appreciates the Commission's thoughtful review of the various comments submitted by the Association and other members of the ocean shipping community that responded to the original ANPRM in this docket. We understand that the ANPRM was intended more as a discussion document by which the Commission would have the opportunity to essentially engage in a dialogue with the industry as to whether there was a need for a comprehensive change in the regulations by which the ocean transportation intermediary ("OTI") industry was regulated.

As the Commission notes in the new NPRM, the industry had and provided "strong views" concerning most of the proposals, which led the agency to reconsider and delete a large number of the changes that had been proffered for discussion. The industry comments were resoundingly, and virtually unanimously, opposed to most of the suggested regulatory changes, contending that they were unnecessary, burdensome, costly and out of step with contemporary regulatory policy, not the least of which was President Obama's directive, in Executive Order 13563 (dated January 18, 20122, 76 Fed. Reg. 3821) requiring that government agencies improve existing regulations by reducing unnecessary regulatory costs and burdens.

The Commission's decision not to go forward with a large number of the more problematic of the proposed changes has accordingly been well received by the trade. Similarly, the proposal that is now pending has several other positive attributes; it provides clearer guidance on a several issues that affect OTI licensing, helps in reducing some costs and tends to codify several of the policies that the Commission has historically used when determining whether to grant license applications. Having said that, several of the pending proposals should be reconsidered and either amended or dropped as they do little or nothing to further the Commission's stated goals of removing unwarranted regulatory burdens.

The more significant issues raised by the NPRM, several of which are supported by the NCBFAA, addressed in these Comments relate to:

- Definitions
- When a license is required and elimination of bonds for branch offices
- Forms and fees

- Licensing issues
- Application evaluation process
- License renewal
- License denial, suspension or revocation procedures
- Filing of claims against OTIs
- Financial responsibility issues
- Duties of OTIs
- Freight Forwarding Fees and Compensation
- Regulatory Flexibility Analysis

I. DEFINITIONS

The NCBAA agrees that the terms "ocean freight broker" "brokerage" no longer need to be defined in the regulations, as it is not clear that the concept is relevant any longer with respect to the liner trade. Nor is clear that there is any significance to the term "small shipment" that would warrant treating it differently from other commercial shipping transactions.[1] And, given the new types of corporate structure, the expanded definition of "person" seems appropriate. Similarly, the proposed new definition of "freight forwarding services" and "NVOCC services" are more consistent with the nature of services that these parties currently provide, although those listing of services could be broadened even further to include the filing of shipment manifest data with the relevant government agencies as part of the services these companies routinely provide.

[1] The Commission's report in Fact Finding Investigation No. 27 does recognize that the shipment of household goods in the so-called "barrel trade" do involve different transportation conditions and should accordingly be treated differently. These comments address only the regulation of commercial cargo.

The Association is concerned that the new definition of "principal" may be misconstrued, as it could be read as extending the duty of an ocean freight forwarder to parties with whom it did not intend to be obligated or with whom it has no contractual relationship. While an ocean forwarder may enter into a contractual relationship, and accordingly owe a duty to, the "shipper, consignee, seller or purchaser" of property, more typically it only enters into such a relationship with one of those parties. And, that contractual undertaking is for the limited purpose of booking the cargo and making other logistical arrangements on behalf of its principal. That the ocean forwarder may be engaged by a shipper in the US to arrange for the movement of cargo that is consigned to some overseas buyer does not also mean that the forwarder owes some duty to any other party to that transaction or to anyone acting on behalf of those other parties. And, the Association assumes that the NPRM was not suggesting otherwise.

The NCBFAA is nonetheless concerned that, as written, this proposed definition could result in ocean freight forwarders being unnecessarily drawn into litigation involving any of those parties – such as loss and damage claims – simply because the regulation could be read as making ***all*** of those parties the "principal" in any transaction. The Association suggests that the definition of this term be amended to make it clear that the "principal" is only the party with whom the ocean forwarder contracts to perform the services.

The new definition of "qualified individual" indicates that the individual in question must have the "experience and character" required by section 19 of the Shipping Act. The NCBFAA believes that the agency's current review process, however, does not adequately address the competency of the qualified individual. In the Association's view, the competence of qualified individuals has consequences both for the parties to the transaction as well as to the nation's security and policy objectives. Without the required background, the OTI may be less likely to have the skill sets or desire to comply with the various Shipping Act requirements or the export/import control requirements of the various other statutes that are applicable to international shipping. The Association accordingly suggests that the Commission consider adding affirmative competency requirements for qualified individuals, much as the NCBFAA has done through its Certified Export Specialist program.

II. WHEN A LICENSE IS REQUIRED

The NCBFAA supports the proposed revisions to section 515.3, and agrees that the language requiring that all separately incorporated branch offices be separately licensed is unnecessary and, at times, is confusing. By definition, if the office is separately incorporated, it is not a branch office as that term is defined in section 515.2(c). Similarly, the proposed language requiring registered NVOCCs to use licensed OTIs in the United States more properly reflects the compliance obligations of the parties and is a positive change.

The NCBFAA also supports the proposal in section 515.4(b) to eliminate the need for OTIs to have an additional $10,000 bond for all branch offices.[2] This change will reduce some burden and cost for OTIs by relieving them of the obligation to continue amending their bonds each time a branch office opens, closes or relocates. And, as the additional bond amount presently required is only $10,000, the elimination of branch office bonds would not have any significant adverse affect on shippers, but would be helpful to the smaller OTI companies.

III. FORMS AND FEES

The NCBFAA believes that the changes proposed to section 515.5 are positive adjustments and should help streamline the application process. Most applicants are already filing applications electronically. As virtually all data, including shipment information, is

[2] Hence, the NCBFAA also supports deleting the specific additional branch office bond requirement in existing section 515.21(a)(4).

already processed and submitted to carriers, NVOCCs, banks, and government agencies in an electronic format, the mandate to file applications with the FMC in this manner should not be a burden to would-be OTIs. And, posting the fees in section 515.5(c)(2) as proposed, should make it easier for parties to find out the filing costs.

IV. APPLICATION EVALUATION PROCESS

The Association does have a question concerning the additional sentence that is proposed to be added to section 515.11(a)(1) requiring that a qualifying individual's experience must be in the US trades. While the NCBFAA recognizes that this has been the agency's informal, unannounced policy for some years, and agrees that those types of policies should be made public, the rationale for this restrictive policy is not entirely clear. The FMC's vetting process for qualifying individuals does not presently look into that person's knowledge of or competency with the Shipping Act, the Commission's regulations or the myriad of export control and other regulations that affect the function of any OTI. While the Association has long urged the Commission to make the role of a qualifying individual more meaningful, no action of that nature has yet been taken. Consequently, it appears that the criteria that are used to evaluate the fitness of a proposed qualifying individual – *viz.*, experience and character – would seem to relate solely to that person's background exclusively with respect to negotiating freight rates, booking cargo and making the various logistical arrangements. The NCBFAA questions whether those tasks are so fundamentally different in the US trades than they are in any of the non-US trades so as to justify eliminating persons who are otherwise clearly experienced in international shipping from serving as qualifying individuals. The NCBFAA suggests, accordingly, that the Commission explain its rationale for this policy before officially promulgating it as a regulation.

Proposed new section 515.12(c) would codify another process by which Commission staff has sought additional information from applicants that has been in effect for some time. While there may have been some concern that establishing rigid deadlines for responding to the agency's questions could be unduly arbitrary, the industry's experience with this Bureau of Certification and Licensing ("BCL") policy indicates otherwise. In most if not all cases, BCL's representatives have appropriately extended deadlines for responding to the various vetting questions that typically arise in evaluating applications as long as the applicant has made the request and is attempting to locate and provide the sought information. Consequently, as the Commission staff applies the deadline requirements both reasonably and flexibly, having this policy made public in the form of a regulation is useful.

V. LICENSE RENEWAL

The NCBFAA has consistently agreed that the Commission should have current information about the companies it regulates.[3] At the very least, the agency should have accurate information concerning the identity of a licensee's (or a foreign based registered NVOCC's) officers and directors and the surety that is providing the required financial security. And, in the case of licensees, that information should also include the qualifying individual and locations of branch offices. However, the NPRM has again selected a method to obtain this information – namely, requiring that OTIs "renew" their licenses and registrations on a triennial basis – that unnecessarily creates burdens for both the industry and the Commission itself. continues the concept of requiring licensees to renew their licenses and the NCBFAA remains opposed to this proposal.

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[3] Of course, that is true not only with regard to OTIs, but also for vessel operating common carriers and the marine terminal operators. The Commission should have accurate and complete information concerning the corporate structure and officers/directors of all of these companies, including contact information. OTIs are not the only parties in ocean shipping that are the subject of claims, and it is often difficult for parties to locate responsible officials in these other companies.

It is true that proposed section 515.14(c) is an improvement over the license renewal process originally suggested in the ANPRM, in that the proposal would now require that this be done every third year rather than every other year. The NPRM also notes that this will entail only an "on-line, user friendly" process and that there will be no filing fee.

Nonetheless, the proposed license "renewal" process raises a number of significant issues. First, although the NCBFAA previously questioned, in its Comments to the ANPRM, the agency's authority to turn existing unlimited term licenses into 3-year licenses that must be "renewed," the NPRM has not addressed this issue. Yet, neither the recent enactment of the legislation called the "Moving Ahead for Progress in the 21st Century Act" ("MAP-21") (which required that property brokers and surface freight forwarders periodically renew their registrations) or the triennial reporting required of customs brokers by US Customs and Border Protection provide any basis for the Commission's license renewal proposal. Both of those periodic "renewal" processes are predicated upon specific statutory authority, and no such authority exists in the US Shipping Act. Moreover, the Association is not aware of any statutory basis in either Title 46 or Title 49 of the U.S. Code, other than the recent MAP-21 legislation[4] or the licensing of merchant seamen by the Coast Guard,[5] for agencies to issue term limited licenses or registrations that must be periodically renewed. At the very least, the Commission should explain the authority on which it relies to make this requirement.

Second, the NPRM does not state that licenses will be automatically renewed once the updated information is provided. It appears, therefore, that there is still some affirmative action

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[4] Even if MAP-21 could serve as supporting rationale for the Commission's renewal proposal, which is not the case, it is clear that Congress took the unusual step of requiring periodic renewals of property broker and domestic surface freight forwarder registrations due to its well documented findings of rampant fraud in that industry. Here, not even the FMC has raised any concerns about systemic malpractices in the commercial ocean shipping industry that would justify this unprecedented step.

[5] *See* 46 U.S.C. §7101, 7106.

on the part of the Commission or its staff that would be required before a license would be "renewed."

The NPRM does remove some of the burdens of the renewal process that had previously been raised. The proposal states that there will be no filing fees,[6] no required filings of certificates of good standing and that the renewals will be handled exclusively on-line with user friendly software. While less burdensome than originally proposed, the "renewal" process still appears to put OTI licenses at risk. Any concept of "renewal" necessarily connotes the possibility that the agency may choose not to renew any particular license for a variety of reasons.[7]

The loss of a license or registration in this industry is literally a death sentence to the company involved and the employees who are dependent upon its continued operations. Assurances that nothing of such a drastic nature is really intended would be of little solace to a company that, for example, is being investigated by the Bureau of Enforcement for some alleged infraction of the Shipping Act and finds the renewal of its license complicated by that happenstance.[8]

And it is not just the FMC's position on this that could cause concern. As the NCBFAA pointed out in its ANPRM comments, it is not unlikely that the authorities in the Peoples' Republic of China might decide to take a similar tack and require periodic renewals of their NVOCC registration requirements. As the PRC's regulation of NVOCCs has consistently

[6] While the agency does not propose any filing fees, it is nonetheless possible that at some point it could require – without notice or comment and using authority the Commission does have – the parties to pay user fees covering the agency's cost of maintaining and monitoring the thousands of filings that would be submitted annually. The industry would benefit by a clear expression that this is not intended.

[7] The NCBFAA previously questioned whether the renewal process would entail any re-evaluation of a licensee's fitness. (*See* the NCBFAA's Comment to the ANPRM at 11.) That question was neither resolved, let alone addressed, in the NPRM.

[8] As the Bureau of Enforcement's views are apparently solicited with respect to new license applications, it is not unlikely that similar deference may take place with respect to the license renewals.

mirrored in some way the requirements of the Shipping Act and the Commission's regulations, it is not a reach to assume that if Chinese NVOCCs are required to renew their FMC registrations, US NVOCCs will ultimately be treated the same way in that country. It is not clear that any PRC renewal requirements would necessarily be as "user friendly" or benign as the process contemplated by the Commission.

Moreover, any "renewal" process would unduly tax scarce Commission resources that are already overburdened. BCL's staff is already hard pressed to keep pace with the large number of applications for new licenses and replacement qualifying individuals that are currently being filed. It is fair to inquire, accordingly, how the Commission would intend to review and approve/disapprove license renewals without diverting its resources from other missions.

But, there is no need to require that licenses be "renewed." By changing the proposed data gathering process to a simple periodic report, the Commission can accomplish its goal while avoiding the problems inherent in a formal license renewal process. The Association previously suggested that the Commission shift away from "renewal" to simply requiring a biannual or triennial report from each OTI updating the information the agency needs. This alternative would operate in a similar fashion as is proposed in the NPRM, as each OTI would be required to update the information on a periodic basis. And, the data could be provided via a simple on-line report or by updating information on a web-based portal.

The triennial reporting process would not require a filing fee, there would be no need for Commission staff to make any substantive determinations as to whether to renew a license or registration, and the required data would then be updated and available to the Commission. And, in the event an OTI failed to respond, that would be evident from the Commission's records and the various sanctions provided by the Act and existing regulations would be available.

As the NCBFAA previously pointed out, the Commission should be mindful of its obligation under both the policy of the Shipping Act and President Obama's executive order cited above to "use the least burdensome tools" to achieve regulatory ends, adopt regulations only when the benefits of doing so clearly outweigh the costs to the industry, and "tailor its regulations to impose the least burden on society." Respectfully, the NCBFAA believes that converting licenses to 3 year terms and requiring that they be renewed does not pass this test.

As the existing regulations already require OTIs to provide the information the agency seeks, and as there is no indication in the NPRM that the vast majority of OTIs fail to comply with their record updating obligations, the NCBFAA urges the Commission to reassess its approach to this issue. Indeed, before seeking to promulgate new regulations that impose significant new risks and burdens on the entire OTI community, the Commission should enforce its existing rules. If an OTI fails to properly update its corporate information with the Commission, the imposition of a few penalties – in those situations where the failure to do so is actually a problem – would likely provide ample incentive to others about the need to take this obligation more seriously. Assuming, however, that any new regulation is really required for the Commission to have accurate information, the updating alternative suggested here would be the least intrusive, burdensome path to follow for both the Commission and the industry – namely, by moving to a simple periodic reporting obligation.

VI. LICENSE DENIAL, SUSPENSION OR REVOCATION PROCEDURES

The NCBFAA is concerned about the proposed revisions to section 515.15 through 515.17 relating to the procedures for appealing from license denials, suspensions and revocations. These proposals purport to "streamline appeal procedures" for OTI license denials, suspensions and revocations by denying these parties their rights to "full evidentiary hearings."

The cited justification provided for this is that the existing process "is often lengthy and expensive", so that the proposed amendments will provide for a "more efficient process" that will bypass the procedures accorded other litigants under the Shipping Act and the Administrative Procedure Act.

Even assuming this new, more summary process does not result in a denial of due process – and it is too early to make that determination – the question must be asked: Why do this? Why is an OTI respondent entitled to a hearing before an administrative law judge only if the license action is coupled with a BOE enforcement action? Has there been any study made indicating that the existing appellate procedures have unduly taxed OTI respondents or even the Commission itself?

The NCBFAA is unaware of any rash of litigation involving license denials, suspensions or revocations that would warrant even a review of the agency's procedures at this point.[9] And, the NPRM does not point to any problem that may have led to this proposal. Accordingly, the Association reiterates the views expressed in its ANPRM comments that this new "streamlined" approach does not sufficiently recognize the importance of OTI licenses and that suggesting short cuts in this area could unfairly jeopardize a company's ability to operate, as well as raise unnecessary concerns about due process. The NCBFAA accordingly recommends that these proposed changes be dropped.

[9] Even if there was any concern in this area, it would appear that this would likely be focused primarily on the malpractices uncovered in Commissioner Khouri's Fact Finding Investigation No. 27 pertaining to the movement of household goods in the so-called "barrel trade" industry. As those issues have nothing to do with the mainstream OTI handling of commercial cargo, any procedure intended to address that subset of traffic should not dictate how the rest of his industry should be regulated. That is particularly the case since the Commission has elected not to consider the license or other consumer-oriented proposals raised by Fact Finding Investigation No. 27 in this NPRM.

VII. FILING OF CLAIMS AGAINST OTIS

The NCBFAA agrees with the elimination of the ANPRM proposal that would have required the sureties, vessel carriers and marine terminal operators to report any claims or court actions against OTIs to the Commission for publication on its website. Nonetheless, the Commission still proposes, in section 515.23(c) to require financial responsibility providers to report notices of claims and any claims that have been paid to the agency.

Again, the questions must be asked: What is the reason for this requirement? What does the Commission intend to do with that information? Does the Commission contemplate doing any statistical or other analysis of this raw data, all of which has little value when viewed in the abstract without understanding the facts? Will the information remain confidential, even if there would be no immediate transparency through any public website? Does the existence of a claim or even payment of a claim by the surety have any relevance to the fitness of an OTI? The NPRM sheds no light on any of these questions, let alone any need or justification for this requirement.

Certainly, the mere filing of a claim involving an OTI has no necessary relevance to its character or fitness to hold a license. The vast majority of claims for loss, damage or delay to cargo or demurrage/detention costs attributable to the movement of carrier equipment that are brought by a shipper against OTI is attributable to the actions of the underlying carriers, ports, other third party subcontractors, government agency inspection holds or weather. Why should the sureties be providing this type information to the agency simply because an OTI is a party? To a certain extent, this is actually a punitive disclosure for OTIs that handle high volumes of traffic, as they are potentially exposed to higher numbers of claims. Indeed, the NCBFAA believes that the vast majority of claims against NVOCCs relate to loss or damage to cargo, yet the underlying vessel operator or inland carrier will almost always be ultimately responsible for that damage.

Moreover, why are claims against OTIs singled out for review, if that is the reason this data is being requested? Why are carriers and marine terminal operators not being required to submit information detailing claims that are made by OTIs or shippers against them? And, why are those parties not required to report the huge demurrage and detention charges they often file against OTIs and shippers, claims that often significantly exceed the economic value of the container and, at that, are frequently based on events over which neither the OTI nor the shipper have any control?

Even assuming there is some basis for the agency to have this data, there is nothing in the NPRM to indicate whether this will be protected from public disclosure. As the Association pointed out in its ANPRM comments on this issue, there is no necessary correlation between the mere filing of a claim with a surety and the character of an OTI, so that the publication or other release of this information may cause inappropriate competitive injury to the subject of any claim.

In the absence of any adequate justification for seeking to compile information over which the Commission has no direct jurisdiction, this proposal should be dropped.

VIII. OTHER FINANCIAL RESPONSIBILITY ISSUES

The NCBFAA agrees that it would be useful reorganizing this section of the regulations so that the various Appendices A through F are moved to the end of Part 515. This change would make the section less cumbersome and easier to review.

And, as noted above, the Association agrees and supports the proposal to eliminate the separate branch office bond requirements in existing section 515.21(a)(4) for OTIs. That would be helpful to smaller OTIs and will not create any significant risks for the shipping public.

IX. DUTIES OF OTIs

While the NPRM has dropped most of the problematic issues relating to advertising and agency requirements that had been raised in the ANPRM, an issue remains with respect to proposed 515.31(j). Apparently extrapolating from issues that sometimes arise with respect to the transportation of household goods for individual consumers, as drafted the proposed section would prohibit any advertising or holding to provide any OTI services "unless that party holds a valid OTI license or is registered under this part." Read literally, no company acting as an agent for OTIs – or even vessel operators – could provide any portion of an OTI related service (such as breakbulk, consolidation, inland drayage on line-haul transportation, documentation, etc.) unless it was licensed or registered.

That is not to say the Commission's apparent concern about unscrupulous, unlicensed companies preying upon household goods shippers is not legitimate. The proposed regulation, however, goes too far and should be limited to address whatever problem the agency believes to be of jurisdictional concern. At the very least, the proposal should be amended so that the prohibition is applicable only when the entity that is advertising is purporting to provide the OTI service in its own name.

X. FREIGHT FORWARDING FEES AND COMPENSATION

The NCBFAA supports the proposal to drop section 515.41(c) (relating to special contracts). The enactment of the Ocean Shipping Reform Act, and its recognition of the importance of individually negotiated rates and services, eliminated the relevance of that requirement.

The Association also supports the revision to section 515.42(c) so as to authorize electronic certifications by forwarders to carriers that the required forwarding services have been provided. The Association would go further, however, and eliminate the need for any certifications of this nature. The vessel operators have largely eliminated the payment of forwarder compensation in their tariffs, and few appear to provide for this in their service contracts. Instead, forwarder compensation is now paid only in those instances when carriers specifically provide for it in recognition of the business that forwarders can bring to them and the services that the forwarders can provide.

Since the enactment of the Ocean Shipping Reform Act, the vessel operators no longer pay forwarder compensation on all traffic. Today, they pay forwarder compensation only when that has been negotiated with a forwarder so that they know when it is appropriate to do so, rather than just because some entity is shown on the so-called "Forwarder" box on the carrier bill of lading. By eliminating this vestigial requirement, the Commission would streamline the regulatory process while eliminating an unnecessary regulatory burden.

XI. THE REGULATORY FLEXIBILITY ANALYSIS

The Commission correctly concludes that most of the proposals contained in the NPRM would not tend to increase costs of OTIs, most of which tend to be small or relatively small businesses. Indeed, several of the proposals, such as the elimination of branch office bonds, would reduce OTI costs.

However, the Commission's conclusion that the renewal obligation would not significantly increase costs suggests that it regards the process as only involving the submission of updated information every three years. But this analysis ignores the cost implication of having to respond to follow-up data requests or to defend against any action that might challenge the renewal of a license that, but for the NPRM, is not term limited. This would likely not be an issue if the Commission's deemed need to ensure that relevant information is updated shifts to the periodic reporting process suggested by the NCBFAA.

XII. CONCLUSION

The NCBFAA appreciates the Commission's willingness to carefully consider the various comments that were submitted in response to the ANPRM. While the Association still has a number of concerns about the pending NPRM, many of the more problematic proposals have been dropped. And, the NCBFAA is confident that the remaining issues can be largely ameliorated by making modest revisions as discussed in these Comments. The NCBFAA looks forward to continuing to work with the Commission and its staff in efforts to further streamline the regulatory process and eliminate unnecessary burdens on the stakeholders of this industry.

Respectfully submitted,

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Date: December 5, 2014